**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION**

ELLEN JOHNSTON **PLAINTIFF**

V. **CIV. ACTION NO.: 2:07CV42 WAP-EMB**

ONE AMERICA PRODUCTIONS, INC., EVERYMAN PICTURES, TWENTIETH CENTURY-FOX FILM CORPORATION and JOHN DOES 1 AND 2 **DEFENDANTS**

OPPOSITION OF DEFENDANTS TO PLAINTIFF'S
MOTION FOR LEAVE TO AMEND COMPLAINT

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Introduction and Summary

In the "Conclusion" to her combined Response and Memorandum in Opposition to Defendants' Motion to Dismiss, Johnston throws in a one-sentence request for leave to amend her Complaint to add a claim for intentional infliction of emotional distress. No proposed Amended Complaint is attached, and the request does not provide the complete substance of the proposed amendment. Perhaps this is because the one sentence makes clear that the claim is based on facts already alleged in the Complaint. Any such amendment would be futile because: 1) the claim is superfluous to those already asserted; and 2) the claim suffers from the same legal deficiencies as the privacy claims that are the subject of Defendants' Rule 12(b)(6) Motion to Dismiss.

A. Johnston's Proposed Amendment Should Be Denied Because Adding Her Proposed Distress Claim Would Be Futile.

Leave to amend "shall be freely given" but only "when justice so requires." Fed. R. Civ. P. 15(a). Justice does not require leave to amend where the proposed amendment fails to state a claim and the amendment would thus be futile. *See Avatar Exploration, Inc. v. Chevron USA,* *Inc.,* 933 F.2d 314, 321 (5th Cir. 1991); *Golden Palace, Inc. v. National Broadcasting Co.,* 386 F. Supp. 107, 110 (D.D.C. 1974) ("motion for leave to amend . . . complaint should be denied because the complaint, even with the proposed amendments, fails to state a claim for relief").

Johnston's proposed amendment to add an intentional infliction of emotional distress claim ("distress claim"), which is based on the same set of facts already alleged, should be denied because adding the claim would be futile. As explained below, Johnston's proposed distress claim is superfluous of her previously pleaded privacy claims, and it fails as a matter of law to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6).

B. Johnston's Distress Claim Is Superfluous of Her Privacy Claims and Subject To Being Dismissed as a Matter of Law.

As is true elsewhere, Mississippi recognizes the tort of intentional infliction of emotional distress. *Lyons v. Zale Jewelry Co.*, 150 So. 2d 154, 158 (Miss. 1963) (adoption of Restatement of Torts elements). Distress claims brought against a mass media defendant that are based on the same conduct as an alleged defamation or privacy claim must be dismissed under Rule 12(b)(6) when they are "superfluous" to other defamation or privacy claims alleged by the plaintiff. *E.g., Mitchell v. Random House, Inc.,* 703 F. Supp. 1250, 1260 (S.D. Miss. 1988), *aff'd on other grounds, Mitchell v. Random House, Inc.,* 865 F.2d 664, 672 (5th Cir. 1989); *see Uranga v. Federated Publications, Inc.,* 67 P.3d 29, 35 (Idaho 2003) ("Changing the cause of action from invasion of privacy to infliction of emotional distress does not circumvent the constitutional protection of the publication."); *Provencher v. CVS Pharmacy,* 145 F.3d 5, 12 (1st Cir. 1998) (New Hampshire law); *Dworkin v. Hustler Magazine, Inc.,* 867 F.2d 1188, 1192-93 (9th Cir. 1989) (New York law). Distress claims are also routinely dismissed under Rule 12(b)(6)[1] where

[1] As explained in their Memorandum in Support of Defendants' Motion to Dismiss at pp. 2-3 (June 20, 2007) and their Rebuttal Memorandum at pp. 5-6 (July 24, 2007), the United States Supreme Court has recently made the standard of review under Rule 12(b)(6) more rigorous. *E.g., Osakwe v.*

the alleged conduct fails as a matter of law to support one of the essential elements of this type of claim under the applicable substantive law. *E.g., Mitchell v. Random House, Inc.,* 865 F.2d 664, 672 (5th Cir. 1989) (Mississippi law); *Alvarado v. KOB-TV, L.L.C.,* No. 06-2001, 2007 WL 2019752 (10th Cir., July 13, 2007) (New Mexico law); *Levin v. McPhee,* 917 F. Supp. 230, 242-43 (S.D.N.Y. 1996) (New York law).

Johnston plainly dislikes the content of the church camp episode and the manner in which - to use the words from her own Complaint - it "mocks" or parodies her religion. Nonetheless, she should not be allowed to proceed with her distress claim based on the incidental accurate use of her image in a crowd scene of a motion picture film.

Her proposed amendment is a clear attempt, through the simple expediency of giving her claim a different name, to try to evade the rigorous, well-established protections afforded mass media defendants from the chilling effect that baseless suits have on freedom of expression under the First Amendment and Section 13 of the 1890 Mississippi Constitution.[2] Defendants have been unable to locate any Mississippi decision that has permitted a distress claim arising from the use of a person's name or image in a mass media publication such as a newspaper, magazine, book, television broadcast, or motion picture film to proceed beyond the pleading stage.

Johnston's distress claim admittedly arises out of the same facts as her alleged privacy claims. See Johnston's Opposition 13 (July 3, 2007) ("as discussed above, there are more than sufficient grounds" for adding an intentional distress claim). Thus, the distress claim is "superfluous" of what is already pled and the request to add that claim should be denied. *See*

Department of Homeland Security, No. G-07-00308, 2007 WL 1886249, *3 & n.2 (S.D. Tex., June 29, 2007).

[2] Miss. Const. § 13 (1890) ("freedom of speech and of the press shall be held sacred").

Mitchell v. Random House, Inc., 703 F. Supp. 1250, 1260 (S.D. Miss. 1988) (inclusion of intentional distress claim based on same facts as defamation and privacy claims), *aff'd on other grounds, Mitchell v. Random House, Inc.,* 865 F.2d 664, 672 (5th Cir. 1989).[3]

C. The Accurate Incidental Use of Johnston's Image In the Crowd Scene of a Motion Picture Film Which Johnston Claims Parodies Her Religion Is Fully Protected Under the First Amendment and Privileged Under Mississippi Law Where Johnston Admits That She Knew She Was Being Filmed.

Assuming, arguendo, that Johnston's distress claim is not sufficiently similar to her privacy claims to be superfluous, this Court must apply the same analysis to her distress claims as it did to her privacy claims. *E.g.,* (a) First Amendment - *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50, 55 (1988) (First Amendment applies to distress claim based on parody about public figure's relationship with his mother); *Pring v. Penthouse International, Ltd.,* 695 F.2d 438, 443 (10th Cir. 1982) ("typical standards and doctrines under the First Amendment must nevertheless be applied" to distress claim); *Deupree v. Iliff,* 860 F.2d 300 (8th Cir. 1988) (speech protected as opinion from private figure defamation claim also protected from distress claim); and (b) common law standards and privileges - *Burris v. South Central Bell Tel. Co.,* 540 F. Supp. 905, 909-10 (S.D. Miss. 1982) (common law standards and privileges apply to distress claim). Once this is done, it is readily apparent that Johnston is not entitled to proceed with her distress claim as a matter of law.

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[3] The Federal district court in *Mitchell* also noted that the language attacked by the plaintiff, a minor character to the events portrayed in the book, was "not capable of being understood in the manner urged by plaintiff" for purposes of allowing her to proceed with her defamation or her false light privacy claim. *Mitchell,* 703 F. Supp. at 1260. Having noted that liability for an intentional distress claim under Mississippi law "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," the District Court also held that "an average member of the community could not reasonably resent the defendants' publication of the statements nor proclaim their conduct 'outrageous.'" *Id.* On appeal, the Fifth Circuit affirmed and held that Mitchell's distress claim failed as a matter of law noting that "[w]hile [the defendant author's] portrayal of Mitchell may be decidedly unfair, it simply does not rise to the level of repulsion." *Mitchell v. Random House, Inc.,* 865 F.2d 664, 672 (5th Cir. 1989).

As explained in Defendants' Motion to Dismiss, motion picture films are entitled to the full protection of the First Amendment. Memorandum in Support of Defendants' Motion To Dismiss 9, 12-13, 19-20 (June 20, 2007). Motion picture films and other forms of expression that allegedly subject a religion or for that matter all religions to "contempt, mockery, scorn, and ridicule" are fully protected by the First Amendment, *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 504 (1952), a proposition that Johnston inexplicably fails to address.

An essential element of an intentional distress claim is "outrageous" conduct by the defendant. *Burris v. South Central Bell Tel. Co.*, 540 F. Supp. 905, 909 (S.D. Miss. 1982), *quoting* Restatement (Second) of Torts § 46, comment *d* (1965); see Defendants' Opp. at pp. 8-9, *infra*. But, as the United Supreme Court has explained, expression that is otherwise protected under the First Amendment does not lose its protection because the content of the publication is controversial, offensive, or even outrageous.

> “Outrageousness” in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988).

In *Falwell*, the United States Supreme Court reversed a jury verdict awarding a prominent, politically-active evangelist damages based on an intentional distress claim brought under Virginia law. The claim arose out of an offensive ad parody published in *Hustler* magazine. In reversing the verdict, the Supreme Court explained that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." 485 U.S. at 50. The Supreme Court concluded that the First Amendment precluded the public figure plaintiff from recovering damages for his intentional distress claim without proof, among other things, that the publication at issue contained a false statement of fact about the plaintiff. 485 U.S at 56.

The First Amendment not only protects commentary (including parody) about political, religious, and social issues that are matters of public interest and concern but non-political subjects and events as well. *Pring v. Penthouse International, Inc.,* 695 F.2d 438, 443 (10th Cir. 1982). The rule that the First Amendment requires that the publication contain a false statement before a distress claim based on a mass media publication may proceed applies to private plaintiffs as well as public figure plaintiffs. *Id.*; *accord, Deupree v. Iliff,* 860 F.2d 300, 304-05 (8th Cir. 1988).

In *Pring v. Penthouse International, Inc.,* 695 F.2d 438, 443 (10th Cir. 1982), the Tenth Circuit reversed and rendered a jury award based on an intentional distress claim brought under Wyoming law. The distress claim was based on a tasteless parody of Miss America contests published in *Penthouse* magazine. In finding that the article was protected by the First Amendment, the appellate court first commented about the parody: "The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatever." 695 F.2d at 443.

Noting that "[t]here is no accounting for the vast divergence in views and ideas," the court explained that "the First Amendment was intended to cover them all. The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards." *Id.* The court then noted that even though "a story may be repugnant in the extreme to an ordinary reader, and we have encountered no difficulty in placing this story in such a category, the typical standards and doctrines under the First Amendment must nevertheless be applied." *Id.* The court concluded by re-emphasizing that "[a]gain, no matter how great its divergence may seem from prevailing standards, this does not prevent the application of the First Amendment. The First Amendment standards are not adjusted to a particular type of publication or particular subject matter." *Id.* [4]

In the instant case, it is undisputed that the church camp episode contains no false statements of fact about Johnston; her image is unaltered, and its inclusion is wholly incidental to the film. As a result, the First Amendment precludes Johnston from proceeding with her distress claim arising from a film that she claims is an offensive parody of her religion.

Mississippi law also protects oral and written statements that are the basis for an intentional distress claim. *E.g., Burroughs v. FFP Operating Partners, L.P.,* 28 F.3d 543, 547 (5th Cir. 1994) (qualified privilege attaches to statements made by an employer against an employee that affect the latter's employment), *citing Benson v. Hall,* 339 So. 2d 570, 572 (Miss.1976). This protection exists for oral and written statements made by an employer about its employee outside the employer-employee relationship to persons with a legitimate interest in the information, *Burroughs,* 28 F.3d at 547-48, and in the context of business-customer relations where the business has a legitimate interest in obtaining the information. *Burris v. South Central Bell Tel. Co.,* 540 F. Supp. 905, 909-10 (S.D. Miss. 1982) (statements by the defendant's employee made during a telephone call to the plaintiff for the purpose of obtaining billing information, including the alleged statement of the defendant's employee that she was going to have the matter involving the plaintiff's account "turned in for fraud" failed to make out an intentional distress claim). Defendants' exercise of their constitutional right of freedom of expression in producing the motion picture film at issue here, no less worthy of protection than the employer-employee relationship and the business-customer (or creditor-debtor) relationship, must be given protection equal to that afforded those relationships, a protection that will be lost if Johnston's distress claim is permitted.

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[4] As the United States Supreme Court has explained, "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (footnote omitted).

D. Johnston's Distress Claim Fails As a Matter of Law Because the Incidental Accurate Use of Her Image In a Crowd Scene When She Knew She Was Being Filmed Is Not Outrageous Under Mississippi Law.

Assuming for the sake of argument that the Mississippi Supreme Court would recognize an intentional distress claim based on a mass media publication, "'meeting the requisites of a claim for intentional infliction of emotional distress is a tall order in Mississippi.'" *Speed v. Scott,* 787 So. 2d 626, 630 (Miss. 2001), *quoting Jenkins v. City of Grenada,* 813 F. Supp. 443, 446 (N.D. Miss. 1993). One of the essential elements of the intentional distress tort is the requirement that the conduct of the defendant must "evoke[] outrage or revulsion" due to its extreme and outrageous nature. *Leaf River Forest Prods., Inc. v. Ferguson,* 662 So. 2d 648, 658 (Miss. 1995).

> Recovery is appropriate only in a case where
>
> the recitation of the fact to an average member of the community would arouse [his] resentment against the actor, and lead him to exclaim, '[O]utrageous[!]'
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

Burris v. South Central Bell Tel. Co., 540 F. Supp. 905, 909 (S.D. Miss. 1982), *quoting* Restatement (Second) of Torts § 46, cmt. *d* (1965).

For the underlying conduct to be actionable in Mississippi, "[i]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Haun v. Ideal Industries, Inc.,* 81 F.3d 541, 548 (5th Cir. 1996) (Mississippi law). For example, the Mississippi Supreme Court has refused to uphold a distress claim under circumstances where a law firm breached its employment contract with an attorney, locking him out, refusing him secretarial support and dropping his name from the firm sign. *Fuselier, Ott & McKee, P.A. v. Moeller,* 507 So. 2d 63, 67 (Miss. 1987).

Rather, the conduct of the defendant as directed against the plaintiff must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Speed v. Scott,* 787 So. 2d 626, 630 (Miss. 2001), *quoting Pegues v. Emerson Elec. Co.,* 913 F. Supp. 976, 982 (N.D. Miss. 1996) (quoting Restatement (Second) of Torts § 46 cmt. *d* (1965)). Whether the alleged conduct of the defendant is "outrageous" is a question of law. *E.g., Hammer v. Slater,* 20 F.3d 1137, 1144 (11th Cir. 1994); *see* Restatement (Second) of Torts § 46 cmt. *h* (1965) ("It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so.")

Johnston goes to great lengths in her Opposition to give her personal feelings about the film, why she believes that the film is "outrageous" and "cruel" and "commercial hate speech." Plaintiff's Opp. at p. 10. But the "'subjective response of the person who is the target of the actor's conduct does not control the question of whether the tort occurred.'" *Rapp v. Jews for*

Jesus, Inc., 944 So. 2d 460, 467 (Fla. App. 4th Dist. 2006) (dismissing distress claim as a matter of law), *quoting State Farm Mut. Auto. Ins. Co. v. Novotny,* 657 So. 2d 1210, 1213 (Fla. App. 5th Dist. 1995) (internal citations omitted). The courts are justifiably skeptical of allowing the bruised feelings of a plaintiff to be turned into actionable conduct based on expressive works that are neither defamatory nor an invasion of a person's privacy. For this reason, perceived indignities based upon the "unfair" treatment of the plaintiff are insufficient to make out a distress claim. *Mitchell v. Random House, Inc.,* 865 F.2d 664, 672 (5th Cir. 1989) ("While [the defendant author's] portrayal of Mitchell may be decidedly unfair, it simply does not rise to the level of repulsion.").[5]

It is undisputed that the film contains no false statements of fact about Johnston; indeed it makes no statement about her at all. It is also undisputed that her image has not been altered in any manner. Finally, it is undisputed that Johnston is part of a crowd scene where she is very,

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[5] Similarly, distress claims based on upsetting but accurate news reports are also regularly dismissed as a matter of law. "Courts regularly hold that upsetting but true news reports do not constitute conduct so extreme and outrageous as to permit recovery." *Alvarado v. KOB-TV, L.L.C.,*No. 06-2001, -- F.3d --, 2007 WL 2019752, *9 (10th Cir., July 13, 2007). In *Alvarado,* the plaintiffs, undercover police officers whose identities were disclosed in a news story broadcast by the defendant television station, argued that the defendant "acted outrageously by broadcasting their names and the fact that they were undercover police officers repeatedly for four days even after being advised of their covert status, and possibly after learning of the risks of that publicity or the fact that a court had sealed documents relating to their undercover status." *Alvarado,* 2007 WL 2019752, *10. In rejecting this argument, the Tenth Circuit noted that "even if publishers are aware that their actions could result in third parties making threats to the individuals identified in the news, courts considering the issue generally find that publishing news under those circumstances is not conduct "beyond all possible bounds of decency," "atrocious," or "utterly intolerable." *Id. citing Ross v. Burns,* 612 F.2d 271, 272 (6th Cir. 1980) (publication of photograph and identity of undercover police officer in article expressing negative view of undercover narcotics officers not extreme or outrageous), and *Duran v. The Detroit News, Inc.,* 504 N.W.2d 715, 720 (Mich. Ct. App. 1993) (publication of location of judge's home, who had received death threats, did not support intentional distress claims where judge had used real name in obtaining housing). Based on these principles, the facts that Johnston alleges that the film shows Johnston and her fellow believers "mocking themselves" and that the content of the film offends Johnston so much that she chooses to call it "outrageous, . . . cruel . . . commercial hate speech", Johnston's Opposition at p.10, is insufficient to breathe life into her distress claim.

very briefly shown doing what others in the same scene are doing, and that Johnston admits that she knew she was being filmed during this worship service.

As explained in Defendants' moving papers, the use of her image in this context does not as a matter of law invade her privacy. Memorandum in Support of Defendants' Motion To Dismiss at pp. 6-20; Defendants' Rebuttal Memo at pp. 7-12. Under these circumstances, it would be unreasonable to conclude that an average member of the community would regard Defendants' inclusion of her image in the film as extreme and "outrageous" conduct. *See Gales v. CBS Broadcasting, Inc.,* 269 F. Supp. 2d 772, 784 (S.D. Miss. 2003) ("Since the comments of [defendants] are not capable of being understood as referring to the plaintiffs, an average member of the community could not reasonably resent the statements nor proclaim them “outrageous.”); *Mitchell,* 703 F. Supp. at 1260 (since the language attacked by the plaintiff, a minor character to the events portrayed in a book, was "not capable of being understood in the manner urged by plaintiff" for purposes of allowing her to proceed with her defamation or her false light privacy claim, "an average member of the community could not reasonably resent the defendants' publication of the statements nor proclaim their conduct 'outrageous.'”).

Johnston alleges that before the filming began, she was told she was being filmed for a religious documentary - not a film that would mock her, her fellow believers, and her religion - and that this is sufficient to support her distress claim. Yet her Complaint fails to allege how her actions or those of her fellow believers would be any different for a religious documentary than for any other commercial film or how they would have differed if Borat's act of speaking in tongues was "genuine."

Similarly, she does not allege that she was told that this documentary would be a puff piece or a film that would even be flattering of her religion. Johnston does not allege that, after learning this filming was about to take place, she moved away from the cameras to another part of the building where she believed she would not be included in the filming. Johnston obviously chose to remain where the camera crew could capture her actions on film.

No person could reasonably conclude, based on the announcement that a religious documentary was about to be filmed, that the content of any such work would necessarily depict those who chose to stay and take part in the religious service in a favorable manner. There can be no legitimate, much less reasonable, expectation that the creator of an expressive work - whether the work is non-fiction or fiction or some combination of both - will satisfy the sensibilities of the people that are depicted in the final work. This is true whether the artist is a painter of portraits, an author, or a film producer. In short, no reasonable person could conclude that, upon Johnston's being told that a camera crew was present and would be filming the worship service for a film and upon her then having decided to stay in an area where the camera crew was filming, Johnston may now legitimately claim that the use of her image in the final film is "outrageous." This is especially the case where the film contains no false statements of fact about Johnston, portrays her image accurately, and uses her image (and that of the others) in the briefest and most incidental manner. *See Gales v. CBS Broadcasting, Inc.,* 269 F. Supp. 2d 772, 778 (S.D. Miss. 2003); *Mitchell v. Random House, Inc.,* 703 F. Supp. 1250, 1260 (S.D. Miss. 1988).

Johnston argues that the representation that a religious documentary was being made constitutes a "fraud." Defendants explain elsewhere why this conclusory statement about a claim not pleaded is in this context erroneous. See Defendants' Rebuttal Memorandum at pp. 9-10. Even accepting Johnston's allegations of "misconduct" based on "fraud" as true, those allegations are insufficient to make an intentional distress claim in connection with the publication of an expressive work under the circumstances presented here. Numerous cases hold that distress claims based on a mass media publication coupled with alleged "misconduct" such as the breach of a purported agreement or the disclosure of otherwise confidential information are as a matter of law insufficient to constitute extreme or outrageous conduct. *E.g., Ruzicka v. Conde Nast Publ'ns, Inc.,* 939 F.2d 578, 583 n.8 (8th Cir. 1991) (identification of plaintiff sexual-abuse victim contrary to agreement not extreme or outrageous conduct); *Fudge v. Penthouse Int'l Ltd.*, 840 F. 2d 1012 (1st Cir. 1988) (publication of otherwise innocuous minor plaintiff's picture and story in sexually explicit magazine not outrageous); *Robinson v. Paramount Pictures Corp.*, 122 App. Div. 2d 32, 504 N.Y.S.2d 472, 472 (2d Dep't 1986) (the plaintiff's claim that he was defrauded by movie producer into revealing his life story upon which movie was based does not state claim for intentional infliction of emotional distress); *Freihofer v. Hearst Corp.,* 480 N.E.2d 349 (N.Y. 1985) (publication in newspaper article of details of court files in matrimonial proceedings concerning prominent area family, in violation of confidentiality provision of state domestic relations statute, did not give rise to intentional distress claim). Accordingly, even if the District Court recognizes the distress claim as presented here, it should deny the Motion For Leave to Amend Complaint on the ground that any such proposed amendment would be insufficient as matter of law to state such a claim.

Conclusion

Defendants respectfully submit that the District Court should decline to accept Johnston's invitation to enter these uncharted waters when, in the light of the preferred position of protection that freedom of expression enjoys under Section 13 of the 1890 Mississippi Constitution,[6] it is not at all clear that the Mississippi Supreme Court would recognize a distress claim based on a mass media publication. *See Carnival Leisure Indus., Ltd. v. Aubin*, 53 F.3d 716, 720 (5th Cir. 1995) ("Litigants who reject a state forum in order to bring suit in federal court under diversity jurisdiction should not expect that new trails will be blazed."). Johnston's Motion for Leave to Amend Complaint should be denied and Plaintiff's Complaint dismissed in its entirety with prejudice, with costs and expenses being assessed to Plaintiff.

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[6] Section 13 of the Mississippi Constitution of 1890 provides that "freedom of speech and of the press shall be held sacred." This language "appears to be more protective of the individual's right to

THIS, the 24th day of July, 2007.

Respectfully submitted,

ONE AMERICA PRODUCTIONS, INC.,
AND TWENTIETH CENTURY FOX FILM CORPORATION

s/ John C. Henegan
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freedom of speech than does the First Amendment since our constitution makes it worthy of religious veneration." *ABC Interstate Theatres, Inc. v. State,* 325 So. 2d 123, 126-27 (Miss. 1976).

CERTIFICATE OF SERVICE

I, John C. Henegan, one of the attorneys for Defendants, hereby certify that I have this day filed the above and foregoing OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
wol@lucketttyner.com

ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 24th day of July, 2007.

s/ John C. Henegan
JOHN C. HENEGAN

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